Supreme Court
F I L E

No. 061148 FEB 14 2007

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IN THE

Supreme Court of the United States

RHONDA COLEMAN

Petitioner

v.

DENNIS W. JACKS, M.D.

Respondent

On Petition For Writ Of Certioran
To The Supreme Court of the State of Arkansas

PETITION FOR WRIT OF CERTIORARI

Rhonda Coleman, pro se
P.O. Box 2863
Pine Bluff, Arkansas 71613
(870) 534-4713

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Arkansas erred when they failed to review the decision of the Court of Appeals although their decision is arguably in conflict with relevant decisions of that court and other state courts of last resort on the same matters as well as decisions of this court?

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INTRODUCTION

Once the inference of negligence created by res ipsa is established, it "will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence." *Graham*, 854 S.W.2d at 801, quoting *Schaffner v. Cumberland County Hosp. Inc.*, 336 S.E.2d 116, 118 (N.C. App. 1985).

Other Court's have held that the doctrine of res ipsa loquitur exists to obviate the need for direct proof of negligence, and allows cases submitted under the doctrine to proceed to the jury even in the absence of direct proof of negligence. See *Graham v. Thompson*, 854 S.W.2d 797, 799 (Mo. App. W.D. 1993).

Despite this the Arkansas Court of Appeals affirmed the decision of the trial court holding that petitioner could not invoke the doctrine of res ipsa loquitor because she had no expert testimony or proof of evidence.

A Petition for Review was filed with the Arkansas Supreme Court. It was denied.

OPINIONS BELOW

The unreported order denying the petition for review is reprinted in the Appendix ("App.") at A. The Arkansas Court of Appeals unpublished opinion is reprinted in App. B.

JURISDICTION

The Arkansas Court of Appeals affirmed order for summary judgment on October 4, 2006. A Petition for Review was filed with the Arkansas Supreme Court October 23, 2006 pursuant to Article II, Rules of the Arkansas Supreme Court and Court of Appeals, Rule 2-4 (c) Grounds for review (ii) the Court of Appeals rendered a decision which is in conflict with a prior holding of a published

opinion of either the Supreme Court or the Court of Appeals. The petition for review was denied on November 16, 2006.
This court has jurisdiction pursuant to 28 U.S.C. § 2101 (c) and pursuant to U. S. Supreme Court Rule 10 (b).

STATEMENT OF THE CASE

The trial court held that the doctrine of res ipsa loquitor did not apply to medical malpractice cases; that there was absence of evidence to the contrary that an injury occurred; that the burden of proof was not met: and there was no expert testimony, **Record ("R") R 370, Line 3-25,** despite responses to interrogatories and admissions opposing the motion for summary judgment. **("Appendix") App.D& F.**

An appeal was filed with the Arkansas Court of Appeals alleging that the trial court erred granting summary judgment when a material fact was left to be litigated; that reasonable minds could differ as to the interpretation of facts as shown by the pleadings; that the right to invoke the doctrine of res ipsa loquitor was denied; and that the defendant's expert witness' affidavit was inconsistent with the evidence presented in support of summary judgment. **R 27-30.** The Arkansas Court of Appeals affirmed the trial courts decision. **App. B**.

A Petition for review was then filed with the Arkansas Supreme Court. **App. C.** The Petition for Review was denied. **App. A.**

REASONS FOR GRANTING THE WRIT

This court should grant *certiorari* for three reasons: the decision below leaves unresolved conflict with this Court and other courts; this Court's guidance is needed to answer a question of exceptional importance; to prevent a miscarriage of justice and to ensure that the Court of Appeals does not remain in conflict with other courts.

I. THE DECISION BELOW LEAVES THE COURT OF APPEALS IN CONFLICT WITH PRIOR HOLDINGS OF THAT COURT AND OTHER U.S. COURTS

The Arkansas Supreme Court's decision leaves unresolved conflict with the Court of Appeals and other court's interpretation and application of the doctrine of res ipsa loquitor as well as this court's interpretation of Rule 56 (c) and (e) of the Federal Rules of Civil Procedure. The decision below leaves the Court of Appeals without guidance when they affirmed a decision that conflicts with precedents already established by that court.

A. The Decision Below Leaves the Court of Appeals in Conflict With Other Courts Interpretation of the Doctrine of Res Ipsa Loquitor Holding that No Direct Proof is Necessary to Invoke the Doctrine of Res Ipsa Loquitor

The Arkansas Supreme Court's decision to deny review leaves the Court of Appeals in conflict with other court's holding that the doctrine of res ipsa loquitur exists to obviate the need for direct proof of negligence, and allows cases submitted under the doctrine to proceed to the jury even in the absence of direct proof of negligence. See *Graham v. Thompson*, 854 S.W.2d 797, 799 (Mo.App. W.D. 1993)

B. The Decision Below Allows The Court of Appeals to Depart From Prior Precedents of the Arkansas Supreme Court.

Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis may reasonably be drawn and reasonable might defer. *Johnson v. Harrywell Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994).

Expert testimony is often necessary to establish the requisite standard of care. There are, however, many instances where it is not essential. The test of whether expert testimony is required was stated by the Court in *Haase v. Starnes*, 323 Ark. 263, 268, 915 S.W.2d 675, 677-78 (1996):

"Our law is well-settled that expert testimony is required only

when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence."

Examples of circumstances where expert opinion was not required are (proceeding with removal of ovary without locating the ureter); *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944) a (failure to sterilize surgical instrument); and *Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970) (failure to send tissue slides for laboratory examination). Other examples of where expert testimony would not be required, such as failure to remove a sponge before closing an operative wound, or allowing gauze to remain in a wound while it healed, are discussed in Lanier v. Trammel, supra, which is recognized as the fountainhead decision on this issue.

Expert testimony is not required when the applicable standard of care is not disputed, *McClain v. Giles*, 271 Ark. 176, 607 S.W.2d 416 (1980)

Res ipsa loquitur is, under appropriate facts, applicable in health care provider cases. *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991).

Watts v. St. Edward Mercy Medical Center, 74 Ark. App. 406, 49 S.W.2d 149 (2001), held that expert testimony was not needed to support appellant's argument of pain because her medical records provided support for the claim.

C. The Decision Below Leaves the Court of Appeals in Conflict With this Court's Interpretation of Rule 56 (e) of The Federal Rules of Civil Procedure.

The Arkansas Supreme Court's decision to deny Petition for Review leaves the Court of Appeals in conflict with this Court holding that Rule 56(e) permits a proper summary judgment motion to be opposed by any kind of evidentiary materials listed in Rule 56 (c) except the mere pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

II. This Court's Guidance is Needed On A Question of Exceptional Importance.

Who and/or what defines the word (s) 'thing' and 'instrumentality' when invoking the doctrine of res ipsa loquitor?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted

Respectfully submitted,

Rhonda Coleman
P.O. Box 2863
Pine Bluff, AR. 71613
(870) 534-4713

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Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

November 16, 2006

Rhonda Coleman
P.O. Box 2863
Pine Bluff, AR 71613

RE: 06-1215. Rhonda Coleman v. Dennis W. Jacks, M.D.

Dear Ms. Coleman:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for review is denied. Dickey, J., not participating."

Sincerely,

"s/ Leslie W. Steen, Clerk

LWS:jko

Cc: Richard L. Angel
Flora Cook, Clerk
(CV-2002-516-2-5)

NOT DESIGNATED FOR PUBLICATION
DIVISION III
ARKANSAS COURT OF APPEALS
No. CA06-44

Opinion Delivered October 4, 2006

RHONDA COLEMAN

APPELLANT

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CV2002-516-2-5]

HON. ROBERT H. WYATT JR. JUDGE

DENNIS W. JACKS, M.D.

APPELLEE

SAM BIRD, Judge

This is the second time this case is before us. Appellant Rhonda Coleman previously appealed from the trial court's decision granting summary judgment in favor of appellee, Dr. Dennis Jacks; however, in an opinion issued on August 31, 2005, we dismissed the appeal. See Coleman v. Jacks, CA05-718 (Ark. App. Aug. 31, 2005). In our previous opinion, we explained that we lacked jurisdiction to hear the appeal because the order being appealed from was not a final order due to the fact that all parties to the action, including several John Doe defendants, had not been dismissed. Id. Rhonda subsequently filed a motion to dismiss the John Doe defendants, which the trial court granted. She has now brought a second appeal.

The history of this case is as follows. On May 31, 2001, Rhonda and her husband, James, filed a complaint against Dr. Jacks, Jefferson Regional Medical Center, South Arkansas Urology, and "John Does, 1-10" as defendants. The complaint was signed by the Coleman's then-attorney, Gail Anderson, and alleged the following

facts. On or about June 1, 1999, Rhonda was admitted to Jefferson Regional Medical Center where she underwent a total hysterectomy and "bladder tact." On June 2, 1999, due to undetected blood loss, "Rhonda received a blood transfusion and underwent a second surgical procedure, following which she experienced "several post-operative complications and developments." After she was released from Jefferson Regional Medical Center, Rhonda began to experience "excruciating pain" in her abdominal area and noticed "strong, foul odors" from her urine. She then went to Dr. Jacks and received antibiotic treatment, but continued to experience pain and odor. She was admitted to Jefferson Regional on November 9, 1999 for an "IVP" procedure, although Dr. Jacks did not order any other laboratory tests. According to the complaint, Dr. Jacks falsely informed Rhonda that the IVP results were "fine."

The complaint alleged, among other things, that the defendants were negligent in failing to properly diagnose and treat Rhonda for her post0operative medical problems and complications. Rhonda sought damages for various reasons, while her husband, James, sought damages for "mental anguish" and for "loss of consortium." The complaint also alleged liability of the defendants pursuant to the doctrine of res ipsa loquitor.

Anderson subsequently filed a motion to be relieved as counsel on the basis of nonpayment of fees. The Coleman's' complaint was later dismissed without prejudice for failure to obtain proper service of process under Rule 4(i) of the Arkansas Rules of Civil Procedure.

On May 30, 2002, Rhonda filed a pro se complaint on behalf of herself and her husband James. The complaint was substantially the same as the one previously filed by Anderson one year earlier, but it did not include Southern Arkansas Urology as a defendant. Rhonda subsequently filed an amended complaint on October 18, 2002; a second amended complaint on May 13, 2003; and a third amended complaint on December 1, 2003. The third amended complaint listed Rhonda as the only plaintiff and omitted James's loss of consortium claim.

The trial court granted summary judgment in favor of defendant Jefferson Regional Center on April 22, 2004. Dr. Jacks filed a motion for summary judgment on November 15, 2004, claiming that Rhonda could not meet her burden of proof pursuant to Ark. Code Ann § 16-114-206 without expert testimony. He attached an affidavit of Dr. Alex Finkbeiner, Chairman of the Department of Urology at the University of Arkansas for Medical Sciences, in which Dr. Finkbeiner opined that there was no medical evidence to support Rhonda's allegations against Dr. Jacks. In her response to Dr. Jack's summary judgment motion, Rhonda produced no evidence (in the form of affidavits, depositions, correspondence, and the like) to rebut Dr. Finkbeiner's opinion other than to say she intended to subpoena her treating physicians as expert witnesses to corroborate her allegations. The court granted Dr. Jack's motion for summary judgment by order dated December 28, 2004. Rhonda filed her first notice of appeal on January 28, 2005.

Because the John Doe defendants were still parties to the action at the time Rhonda filed her first appeal, this court dismissed the appeal on the basis that she failed to appeal from a final order. See Coleman v. Jacks, supra. Rhonda subsequently filed a motion for voluntary non-suit to dismiss the John Doe defendants, which was granted on September 19, 2005; Rhonda then filed a second notice of appeal on October 19, 2005.

Rhonda contends that the trial court erred by granting summary judgment in favor of Dr. Jacks. Pointing to alleged inconsistencies in the evidence and claiming that Dr. Finkbeiner did not review all of the medical records, Rhonda argues that a question of fact remains regarding proximate cause and allegations of damage, and she asserts that reasonable minds could differ as to the conclusions to be drawn from the facts presented. She also claims that expert testimony was not needed in this case because the matter "lies within the comprehension of a jury of laymen" and "the medical records speak for themselves." Rhonda also argues that she met her burden of establishing the applicability of the doctrine of res ipsa loquitor.

In Mitchell v. Lincoln, __ Ark. __, __, __ S.W.3d __, __ (June 22, 2006), our supreme court stated as follows:

A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated, and that the part is entitled to judgment as a matter of law. Harris v. City of Fort Smith, 359 Ark. 355, __ S.W.3d __ (2004). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material fact. Young v. Gastro-Intestinal Center, 361 Ark. 209 __ S.W.3d __ (Mar. 24, 2005). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. Id. This court views the evidence in a light most favorable to the party, against whom the motion was filed, resolving all doubts and inferences against the moving party. Adams v. Arthur, 333 Ark. 53, 969 S.W.2d (1998).

Under Arkansas law, the burden of proof for a plaintiff in a medical malpractice case is fixed by statue. See [Ark. Code Ann.] § 16-114-206. The statue requires that, in any action for a medical injury, expert testimony is necessary regarding the skill and learning possessed and used by medical care providers engaged in that [specialty] in the same or similar locality. See Young, supra; Williamson v. Elroy, 348 Ark. 307, 72 S.W.3d 489 (2002).

(a) Specifically, the statue provides as follows:

In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

(2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

(3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

The court in Mitchell also discussed the issue of when expert Testimony was required in a medical malpractice case, stating:

The vast majority of our cases to have considered this issue hold that expert medical testimony is necessary because the alleged medical negligence is not within the comprehension of a jury of laymen. See Fryar v. Touchstone Physical Therapy, __ Ark. __, __ S.W.3d __ (Feb. 16, 2006) (connection between preexisting neck and spine injuries and alleged injuries caused by an unlicensed chiropractor's treatment "would not be a matter of common knowledge or understanding"); Eady v. Lunsford, 351 Ark. 249, 92 S.W.2d 57 (2002) (expert testimony required to rebut defense testimony regarding whether a physician has a duty to inform a patient about rare side effects of a medication); Skaggs v. Johnson, supra (medical decision to leave a piece of drainage tube in a patient's leg, as opposed to an inadvertent leaving of objects in a patient's body, presented an issue outside the jury's common knowledge and required expert testimony); Robson v. Tinnin, supra (matters relating to the changing of dental implants and treatment of fractured teeth are not matters of common knowledge); Davis v. Kemp, supra (whether it was proper or improper on a first medical visit to irrigate a wound and administer antibiotics was not a matter of common knowledge, and the failure to find a piece of glass on the first visit would hinge upon whether or not good medical practice required the probing of the wound on the first visit); but cf. Watts v. St. Edward Mercy Medical Center, 74 Ark. App. 406, 49 S.W.3d 149 (2001) (no need to provide expert testimony on the issue of whether a broken hip can cause pain).__Ark. At __, __ S.W. 3d at __.

In the case at bar, Rhonda failed to produce any evidence (in the form of affidavits, depositions, correspondence, and the like) in response to Dr. Jack's summary-judgment motion. The fact that she indicated that she would produce expert testimony at some point is insufficient; she failed to meet "proof with proof" as required by law and, thus, there was no genuine issue of material fact for trial.

As for Rhonda's argument that she has established the applicability of the doctrine of res ipsa loquitor, in Schmidt v. Gibbs, 305 Ark. 383, 387, 807 S.W.2d 928, 931 (1991), a wrongful-death medical malpractice case, our supreme court set forth those circumstances in which the doctrine of res ipsa loquitor may be invoked:

1. The defendant owes a duty to the plaintiff to use due care;
2. The accident is caused by the thing or instrumentality under the control of the defendant;
3. The accident which caused the injury is one that, in the ordinary course of things would not occur if those having control and management of the instrumentality used proper care;

There is an absence of the evidence to the contrary.

In Schmidt, the court explained that, if each of the elements for the application of the doctrine of res ipsa loquitor is present, then the accident from which the injury is prima facie evidence of negligence and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part. Id.

In attempting to bring her case within the gambit of the doctrine of res ipsa loquitor, Rhonda argues that her evidence satisfies the requirements of Schmidt, asserting that "dr. Jacks is the 'instrument' or 'thing' that caused the bleeding" and that led to her subsequent medical problems, and argues that Webster Dictionary includes "an individual" within its definition of a "thing'; however, she fails to cite any other authority to support this assertion. Furthermore, she fails to explain how the facts of this case relate to the other three elements that must be present to invoke the doctrine of res ipsa loquitor. Because this argument is not well taken, we need

not address it on appeal. See Rainey v. Hartness, 339 Ark. 293, 304, 5 S.W.3d 410, 418 (19990 (stating that an appellate court will not consider assertions of error that ere unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well-taken).

For these reasons, we hold that the trial court did not err in granting summary judgment for Dr. Jacks.

Affirmed

PITTMAN, C.J., and NEAL, J., agree.

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IN THE SUPREME COURT of the STATE of ARKANSAS
NO CA06-44

RHONDA COLEMAN PETITIONER
V.
DENNIS W. JACKS, M.D., RESPONDENT

PETIION for REVIEW
After Decision by the Arkansas Court of Appeals
Filed October 23rd, 2006

Petitioner Rhonda Coleman pro se
P.O. Box 2863
Pine Bluff, AR 71613
(870) 534-4713

IN THE SUPREME COURT of the STATE of ARKANSAS

RHONDA COLEMAN PETITIONER

V. **NO CA06-44**
DENNIS W. JACKS, M.D., RESPONDENT

PETITION for REVIEW

Pursuant Article II, Rules of the Supreme Court and Court of Appeals Rule 2-4, (c) (ii) Petitions for Review, Petitioner Rhonda Coleman respectfully petitions this Court to review the October 4, 2006, unpublished opinion of the Court of Appeal (Division III) affirming summary judgment for Dr. Dennis W. Jacks, M.D. A copy of the decision is attached.

ISSUES PRESENTED FOR REVIEW

Whether expert testimony is necessary in a medical malpractice case when the applicable standard of care is a matter of common knowledge? Whether summary judgment is appropriate when Appellant's responses to discovery are evidence that creates a question of fact on the issues of negligence and proximate cause?

WHY REVIEW SHOULD BE GRANTED

I. REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS BETWEEN THE DECISION RENDERED BY THE COURT OF APPEALS AND PRIOR HOLDING OF PUBLISHED OPINIONS OF THE COURT OF APPEALS AND THE SUPREME COURT.....

1. Summary judgment is only approved when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the non-moving party is not entitled to a day in court. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999). *Flentje v. First Nat'l Bank Of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). *Shelton v. Fiser*, 340 Ark. 89, 95-96, 8 S.W.3d 557, 561 (2000) (citing *Adams v. Arthur*, 333 Ark. At 62, 969 S.W.2d at 605).

2. Expert testimony is not required in medical malpractice cases when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from an incision before closing it. *Eady v. Lansford*, 351 Ark. 249, 92 S.W.3d 57 (2002). *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944). *Watts v. St. Edward Mercy Medical*

Center, 74 Ark. App. 406, 49 S.W.3d 149 (2001).

3. The plaintiff must present expert testimony only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996). *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995) (citing *Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 793 S.W.2d676 (1987)).

4. It does not automatically follow that the moving part is entitled to summary judgment simply because no affidavits were filed in response to a motion. *Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991).

CERTIFICATE OF MERIT

I certify that this petition is not filed for the purpose of delay.

Respectfully submitted,

"s/Rhonda Coleman

Rhonda Coleman
P.O. Box 2863
Pine Bluff, AR 71613
(870) 534-4713

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Review was delivered by U.S. mail, certified, return receipt on this 23rd day of October, 2006 to the following:

Angel Law Firm
100 Morgan Keegan Drive, Suite 420
Little Rock, AR 72202-2213

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

RHONDA COLEMAN **PLAINTIFF**

vs. **CASE NO.: CV-2002-516-2-5**

DENNIS W. JACKS, M.D., JEFFERSON REGIONAL MEDICAL CENTER; AND JOHN DOES 1-10 ALL JOINTLY AND SEVERALLY **DEFENDANTS**

RESPONSES TO ADMISSIONS PROPOUNDED TO PLAINTIFF, RHONDA COLEMAN

Comes, Plaintiff Rhonda Coleman, for her Responses to Defendant Dennis W. Jacks, M.D., Request for Admission states:

REQUEST FOR ADMISSION NO. 1: Admit that you have not identified in discovery, nor do you intend to call as a witness at trial, any physician expert to testify that any acts and/or omissions of Defendant, Dennis W. Jacks, M.D., constitute medical negligence **R 102.**

FILED
NOV 22 2004
"s/Brenda Hardin DC
JEANETTE HENCE
Circuit & County Clerk
JEFFERSON COUNTY, ARKANSAS

regarding Dr. Jacks' care and treatment of Plaintiff, Rhonda Coleman.

RESPONSE NO. 1: Plaintiff denies admission. Plaintiff admits that she has not identified in discovery. Plaintiff denies that she does not intend to call physician expert. Plaintiff intends to subpoena Dr. Steven Wright and Dr. Gail Reede Jones as treating physicians to corroborate Plaintiffs' allegations that acts and/or omissions of Defendant, Dennis W. Jacks, M.D., constitute medical negligence regarding Dr. Jacks' care and treatment of Plaintiff, Rhonda Coleman. **R 102.**

REQUEST FOR ADMISSION NO. 2: Admit that you have

not identified in discovery, nor do you intend to call as a witness at trial, any physician expert that will testify to support any allegations of Plaintiff, Rhonda Coleman, that any alleged acts and/or omissions by Dr. Jacks in his care and treatment of Plaintiff, Rhonda Coleman, were a proximate cause of any injuries or damages suffered by Plaintiff, Rhonda Coleman. **R 102.**

RESPONSE NO. 2: Plaintiff denies admission. Plaintiff admits that she has not identified in discovery. Plaintiff denies that she does not intend to call as witnesses physicians expert that will support any allegations of Plaintiff, Rhonda Coleman, that any alleged acts and/or omissions by Dr. Jacks in his care and treatment of Plaintiff, Rhonda Coleman, were a proximate cause of any injuries or damages suffered by Plaintiff, Rhonda Coleman. Plaintiff intends to subpoena Dr. Steven Wright and Dr. Gail Reede Jones to corroborate her allegations. **R 102-103**.

REQUEST FOR ADMISSION NO. 3: Admit that none of the treating physicians of Plaintiff, Rhonda Coleman, including, but not limited to, Steven Wright, M.D., and Gail Reede Jones, M.D., will be called at trial as expert witnesses on behalf of Plaintiff, Rhonda Coleman, to testify in support of any allegations by Plaintiff, Rhonda Coleman, that Defendant, Dennis W. Jacks, M.D., was negligent in his care and treatment of Plaintiff, Rhonda Coleman, and that such negligence was a proximate cause of any injuries or damages to Plaintiff, Rhonda Coleman. **R 103.**

RESPONSE NO. 3: Plaintiff denies admission. Plaintiff admits that she will subpoena both Dr. Steven Wright and Dr. Gail Reede Jones to corroborate her allegations that Dr. Jacks was negligent in his care and treatment of Plaintiff, Rhonda Coleman and that such negligence was a proximate cause of injuries or damages to Plaintiff. **R 103.**

Respectfully submitted,
By "s/ Rhonda Coleman
Rhonda Coleman, pro se
P.O. Box 2863
Pine Bluff, AR 71613

CERTIFICATE OF SERVICE

I, Rhonda Coleman, certify that a copy of the foregoing was sent via facsimile and hardcopy sent via U.S. Mail, postage prepaid, this 22nd day of November, 2004, to the following:

Angel Law Firm, PLLC
100 Morgan Keegan Drive, Suite 420
Little Rock, Arkansas 72202

"s/Rhonda Coleman

SUBSCRIBED AND SWORN to before me this 21st day of November, 2004

"s/ Betty J LaGRONE
Notary Public
My Commission Expires: August 31, 2012

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

RHONDA COLEMAN

PLAINTIFF

vs. **CASE NO.: CV-2002-516-2-5**

DENNIS JACKS

DEFENDANT

REPLY BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT, DENNIS W. JACKS, M.D.

Comes, now Plaintiff, Rhonda Coleman, with my response in Opposition to Motion of Summary Judgment for Defendant Dennis W. Jacks, M.D., which states: **R 298**.

FACTUAL BACKGROUND

Plaintiff was initially seen by Defendant Dennis W. Jacks,

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JEANETTE HENCE
Circuit Clerk
JEFFERSON COUNTY, ARKANSAS
"s/Brenda Hardin, DC

M.D. ("Dr. Jacks"), on April 16, 1999 after being referred to him by Dr. Sterling Roaf, OB/GYN for urinary incontinence. Dr Jacks recommended to Plaintiff that she have a hysterectomy along with bladder repair. **R 298.**

On June 1, 1999 surgery was performed on Plaintiff by Dr. Sterling Roaf, M.D., and Dr. Dennis Jacks, M.D. Plaintiff was hospitalized from June 1, 1999 through June 7, 1999. While hospitalized at Jefferson Regional Medical Center, Plaintiff had severe bleeding requiring blood transfusions and an emergency surgery on June 2, 1999. Plaintiff also experienced other complications and was overdosed with a nephrotoxic drug. Plaintiff was not informed by either medical care provider prior to or after the emergency surgery as to her medical condition. **R 298.**

Shortly after being discharged Plaintiff began to have painful urination. According to medical records from Dr. Jacks, Plaintiff had multiple complaints of painful urination in the month of June 1999 after her surgery she was treated by him for an infection. Other than a urinalysis and urine culture no other test were done by Defendant. **R 298.**

Medical records from Dr. Jacks indicate that Plaintiff was seen June 1999 and again by Dr. Jacks for a follow up appointment on July 27, 1999 after her surgery and was advised to return to his office as needed. **R 299.**

In November 2000, at the suggestion of her primary physician, Plaintiff was advised to go back to Dr. Jacks for complaints of flank pain and for problems with urination since he had performed her bladder surgery. **R 299.**

Plaintiff was seen again by Dr. Jacks on November 7, 2000 for complaints of having blood and nitrite in her urine, and flank pain. Defendant insisted that Plaintiff was experiencing pain from

irritable bowel syndrome, even though Plaintiff insisted that she had been experiencing flank pain. Defendant's office staff scheduled Plaintiff for an IVP with contrast for November 9. Plaintiff was given an instruction sheet for a bowel prep and advised that Dr. Jacks would call her after he got the results. Defendant failed to order test to check Plaintiffs' kidney functions prior to this procedure exposing her to a nephrotoxic agent. Plaintiff was notified by Dr. Jacks by phone a few days later that the IVP was normal and that she should just drink plenty of water and take her medicine for Irritable Bowel Syndrome. **R 299.**

Plaintiff continued to experience flank pain and continued to have problems with urination, so she requested that her primary physician refer her to a kidney specialist. It was after this referral that Plaintiff was advised that she had a possible kidney stone then later told that she had a blood clot to her kidney and would have to be on antibiotics indefinitely. **R 299.**

ARGUMENT

a. Plaintiff invokes the theory of res ipsa loquitor

Plaintiff is invoking the theory of **res ipsa loquitor**. Opinion delivered by the Arkansas Court of Appeals March 22, 2000 expressly holds that in order to submit a **res ipsa loquitor** theory to the fact-finder, the plaintiff must establish four elements: (1) the defendant owed a duty to the plaintiff to use due care; (2) the **R 299-300**. accident was caused by a thing "or" instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary course of things, would not have occurred if those having control and management of the instrumentality had used proper care; and (4) there is an absence of evidence to the contrary; it is essential that the harm-causing instrumentality be under the exclusive control of the defendant. When each of the elements of res ipsa loquitor is present, the burden shifts to the defendant to prove that the injury was not caused through any lack of care on its part. *Baker v. Clark*, 322 Ark, 702 S.W.3d (2000). **R 300.**

The courts have also held, however, that expert testimony is not necessary per se in every medical malpractice case. The law is

well-settled that expert testimony is required only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995) (citing *Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987)). To emphasize that expert testimony is not required in every medical-malpractice case per se, the court in *Hasse v. Starnes*, M.D., 323 Ark. 263, 915 S.W.2d 675 (1996) repeated a statement from *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970), that was quoted in *Davis v. Kemp*, 252 Ark. 925, 481 S.W.2d 712 (1972): **R 300.**

An expert is not needed to support Plaintiffs' allegations that she has suffered pain since November 2000. The medical records of the Plaintiff speak for itself. It is documented that Plaintiff has complained of pain since November 2000. **R 300.**

b. Plaintiff sustained a medical injury

"Medical injury" is defined under the Medical Malpractice Act at Ark. Code Ann. § 16-114-201(3) (1987) as "any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; ...or from failure to diagnose, ...or otherwise arising out of or sustained in the course of such services. **R 299.**

(1) The Defendant owed a duty to the Plaintiff to use due care. (2) the accident was caused by a thing "or" instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary course of things, would not have occurred if those having control and management of the instrumentality had used proper care; and (4) there is an absence of evidence to the contrary; it is essential that the harm-causing instrumentality be under the exclusive control of the defendant. **R 301.**

c. Defendant is not entitled to a summary judgment

Summary judgment should be granted only when it is clear

that there are no disputed issues of material fact. *Porter v.Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993). All proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. *Pastchol v. St. Paul Fire & Marine Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996). **R 301.**

The Plaintiffs' medical records clearly reflect that she has complained of flank pain and problems with urination since November 9, 2000. Documentation in the medical records of Plaintiff stated that she had a blood clot to her kidney. **R 302.**

Plaintiff intends to subpoena her treating physicians as expert witnesses to corroborate her allegations against the Defendant. Plaintiff has evidence in her medical records to substantiate her allegations against the Defendant. **R 305.**

The Defendants expert witness opinions are not specifically supported by all of Plaintiffs' medical records. Defendants Exhibit "P" titled Medical Records Of Rhonda Coleman Reviewed By Alex Finkbeiner, M.D., don't contain all copies of Plaintiffs' hospital records. It contains hand picked records. There is substantial relevant evidence documented in Plaintiffs' hospital medical records to substantiate Plaintiffs' allegations against the Defendant. **R 305.**

Respectfully submitted,

Rhonda Coleman, pro se
P.O. Box 2863
Pine Bluff, AR 71613

CERTIFICATE OF SERVICE

I, Rhonda Coleman, certify that a copy of the foregoing was mailed via U.S. Mail, postage prepaid, this 22nd day of November 2004, to the following:

Angel Law Firm, PLLC
100 Morgan Keegan Drive, Suite 420

Little Rock, Arkansas 72202

"s/Rhonda Coleman

SUBSCRIBED AND SWORN to before me this 21st day of November 2004

"s/Betty J. LaGrone
Notary Public
My Commission Expires: August 31, 2012

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

RHONDA COLEMAN

PLAINTIFF

vs. **CASE NO.: CV-2002-516-2-5**

DENNIS W. JACKS, M.D., JEFFERSON REGIONAL MEDICAL CENTER; AND JOHN DOES 1-10 ALL JOINTLY AND SEVERALLY

DEFENDANTS

SUPPLEMENTAL RESPONSES TO SEPARATE DEFENDANT DENNIS W. JACKS INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Comes, Plaintiff Rhonda Coleman, for her Responses to Defendant Dennis W. Jacks, M.D., Interrogatories states:

INTERROGATORY NO. 7: Please sate whether you, your attorney, or any other representative on your behalf, have obtained statements (written or recorded) from any person (including

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"s/Laura Patterson, D.C
NOV 29 2004

Defendant Jacks) regarding their opinions or knowledge about the matters alleged in your Complaint, and if so, please state:

(a) From whom the statement was obtained;

(b) The date the statement was obtained;

(c) The form in which the statement was obtained; and

(d) Who has possession of the statement?

(Plaintiffs are requested to provide any such statements, if obtained, in Request for Production No. 6.)

RESPONSE: I have a copy of a faxed progress note from Dr. Dennis Jack's office dated April 16, 1999, suggesting that I have surgery. I have medical records. **R 286.**

INTERROGATORY NO. 8: Please state whether you will present any documentary evidence at the trial of this matter. If your answer is in the affirmative, please state:

(a) The identity of the documents;

(b) The facts and/or opinions to be presented or described by the documents; and

(c) The custodian of said documents. **R 287.**

RESPONSE: Yes. (1) Progress note from Defendant dated 4/16/99 showing that it was Dr. Dennis Jack's opinion that I should have a hysterectomy. The document is in my possession and there should be a copy in the medical records of Dr. Jacks, M.D., regarding his care and treatment of Plaintiff, Rhonda Coleman. (2) Medication sheets to show medication errors occurred at JRMC June 1999. (3) Nurses notes to show that Defendant gave an order for pain prior to surgery June 2, 1999. (4) Physician's hospital progress note showing that Defendant was aware of Plaintiffs' complaint prior to surgery June 2, 1999. (5) Consent form dated June 2, 1999 prior to surgery to show that no physician signature exists. (6) Medical records from Dr. Steven Wright and Dr. Gayle reed Jones to show that Plaintiff has been seen on numerous occasions for complaints of pain and urological symptoms. (7) Results of labs, x-rays, CT and

renal ultrasound that are abnormal. (8) Physician's orders dated June 2, 1999 to show that Defendant gave an order for pain prior to surgery June 2, 1999. **R 287**.
Plaintiff has already signed an authorization for release of medical records. **R 288.**

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

RHONDA COLEMAN PLAINTIFF

V. NO.CV-2002-516-2-5

DENNIS W. JACKS DEFENDANT

RECORD OF HEARING

BE IT REMEMBERED, that on December 13, 2004, came on for a hearing in chambers in the above-captioned matter before the Honorable John B. Plegge, Circuit Judge on Assignment, Assignment Number 04-176, Eleventh Judicial District, West, Fifth Division, of which Jefferson County, Arkansas, is a part; and all parties announcing ready, the following proceedings transpired; said hearing being reported by Nevelyn Smith, Arkansas Supreme Court-Certified Court Reporter for said division of the Circuit Court of Jefferson County for said Eleventh Judicial District, West, of Arkansas. **R 356.**

APPEARANCES

FOR THE PLAINTIFF: MS. RHONDA COLEMAN, PRO SE
P.O. BOX 2863
PINE BLUFF, AR 71613-2863

FOR THE DEFENDANT HONORABLE RICHARD L. ANGEL
Angel Law Firm, PLLC
100 Morgan Keegan Drive, Suite 420
Little Rock, AR 72202-2213

MR. ANGEL: The other issue being raised by Ms. Coleman, which I'll also address this morning, your Honor, is the fact that Ms. Coleman is of the belief in her pro se capacity that the legal doctrine of res ipsa loquitor applies to this case and that she can invoke such a doctrine. **R 358 Lines 16-20.**

THE COURT: Accordingly, the main thing that – one of the main things that I am basing the summary judgment motion that I'm going to approve on is what Mr. Angel just said. The law requires that when a motion for summary judgment is filed then the defendant or opposing party must meet proof with proof. That doesn't mean just coming in and saying something. You've got to file something showing that what he said is wrong. You've not done that. There is no proof whatsoever in here that everything he said in his motion for summary judgment is not exactly true. Because there is nothing to the contrary other than the statements which you have made and that's not proof in the record. So I have to have proof.

Res ipsa loquitor doctrine does not apply in these type cases. So that is denied. **R 370, lines 3-18.**